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DEC 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

A. T. SCHORB,
Respondent.

No. 632

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and issue its writ of certiorari directed to the Circuit Court of Appeals within and for the Eighth Circuit, hereinafter referred to for convenience as the court below, directing it to send to this Court for review its opinion and judgment rendered and entered on October 19, 1945, rehearing in which was denied November 7, 1945, by the court below, in this case lately there pending, styled Terminal Railroad Association of St. Louis, a corporation,

Appellant, v. A. T. Schorb, Appellee, No. 13,081, on the docket of the court below, affirming a judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause in favor of respondent and against your petitioner herein.

OPINION OF THE COURT BELOW.

The opinion of the court below in this cause, which is by this petition sought to be reviewed, appears on pages 207 to 216 inclusive, of the printed transcript of the record filed herein. It has not yet been published in the Federal Reporter, or in the advance sheets thereof.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). The jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347, providing for review in this Court by certiorari of decisions of the various United States Circuit Courts of Appeals. Authorities sustaining the jurisdiction are Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, and Owens v. U. P. R. Co., 319 U. S. 715, 87 L. Ed. 1683.

This action is brought by respondent under the Federal Employers' Liability Act (hereinafter called the Act) (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover damages for personal injuries sustained September 11, 1943 (R. 83).

He had been in petitioner's employ as a switch foreman for fifteen years (R. 84).

He was injured in one of petitioner's switch yards (R. 12) in East St. Louis, Illinois (R. 12), when he stepped on a switch track and was struck (R. 86) when cars were shunted ("kicked") against a standing car on track 18 (R. 99, 100).

Both respondent and his witnesses testified that this switch yard was a dangerous place which necessitated constant vigilance by switchmen to avoid injury (R. 23, 25, 52, 96, 98, 100).

Immediately before his injury respondent had been directed by his superior to go to the shanty and obtain the bills of lading covering a train he was to take out of the yard (R. 85, 86). He started towards the shanty immediately (R. 86), moving in a northeasterly direction (R. 86) towards a Burlington freight car standing on track 18 (R. 86). When respondent reached a point about three feet west and ten feet south of the north end of this Burlington car, he looked towards the south (R. 97) and could see to the point marked "19" on the plat (R. 129). From that point he could see some cars between Cabin One and the B. & O. crossing, but saw no engine (R. 98). He could not tell whether or not the cars were moving (R 98). At that time the switches were not lined for a movement to track 18 (R. 87).

Respondent then turned and walked north alongside the Burlington car for a distance of ten feet to the north end of it, and an additional ten feet or twelve beyond the north end of that car (R. 99). At that point he again looked towards the south, but could not see beyond the Burlington car (R. 99). Consequently, his looking at that time and place was ineffectual (R. 99). He then turned east and started across the track not knowing whether or not cars were being moved over that track (R. 99, 100).

When he reached "about the middle" of the track (R. 100), he heard the yardmaster shout to him, turned, and

the Burlington car "jumped" north (R. 86, 100), struck and injured him; derailed and ran along on the ties for about a hundred feet (R. 59, 73).

The Burlington car had been struck by three cars from the south which had been shunted or kicked against the Burlington car. The intention of the switch foreman in charge of the crew which shunted the cars, was to strike the Burlington car hard enough to roll all four cars far enough north to clear the cross-over between the east-bound yard and the ice house lead (R. 151).

The shunted cars moved at a speed estimated at from three and a half to five miles an hour (R. 142, 154), ten miles an hour (R. 161), twelve to fifteen miles an hour (R. 72).

Respondent's witness Butler (R. 18) and appellant's witness Siebert (R. 142) testified the customary speed of shunted cars was three and a half to five miles an hour. Respondent's witnesses Butler (R. 57), Tunze (R. 61), and Burk (R. 65), and petitioner's witness Jefferson (R. 154), testified there was no usual or customary speed.

The uncontradicted evidence (R. 26, 27, 143, 146, 154) was that the maximum speed of shunted cars is determined solely by the risk of damage to the cars, their contents, the track and roadbed; and not potential injury to switchmen, who are expected to keep out of the way of moving cars (R. 26, 27).

Respondent submitted his case upon "excessive" speed of the shunted cars (R. 183). His injuries were severe; and the verdict was in his favor for $35,000 (R. 199).

QUESTIONS PRESENTED.

I.

May respondent, injured when struck by a moving box car in a switch yard, recover on the ground that the car was struck by other cars shunted or kicked against it at alleged excessive speed when the evidence:

(a) Shows that petitioner owed respondent no duty to shunt the cars at any given speed?

(b) Shows that the alleged usual speed of shunted cars was fixed solely by the danger of damage to other cars, their contents, and the track; and not by any danger to switchmen, who were expected to look out for themselves?

(c) Shows that for shunting cars there was no normal or usual speed fixed by law, rule or a definite, uniform, universal custom?

(d) Shows that respondent stepped on the track without using any care to ascertain whether or not cars were in process of being shunted on that track?

(e) Fails to show that respondent would not have been injured had the cars been shunted at a slower speed?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

Proof of violation of a duty by a defendant is insufficient to show actionable negligence. The proof must go further and show violation of a duty defendant owed to plaintiff. Therefore, before respondent could make a submissible case against petitioner, he was compelled to prove that petitioner owed to him the duty of shunting cars at not more than a given speed. There is a complete absence of proof that petitioner owed to respondent any such duty.

In his attempt to prove negligence, respondent relied solely upon alleged excessiveness of the speed of the shunted cars. "Excessive" speed in this sense means a speed which is more than is legally authorized. There is no contention that the law or any rule of petitioner fixed the authorized speed. Therefore, if there was any authorized speed, it must have been fixed by custom.

In the absence of such a custom as will supersede the ordinarily governing principle of law, no duty rested upon petitioner to shunt cars at any certain rate of speed; but, on the contrary, respondent's duty was to look out for moving cars.

II.

Before a custom will be permitted to supersede the law, it must be proved to have been definite, uniform, and known; and to have been followed under certain, definite and uniform circumstances.

(a) There is no such proof in this record (R. 18, 25, 26, 27, 33, 49, 53, 57, 61, 65, 142, 154). The "usual, customary" speed for shunting or kicking cars was said by two witnesses (R. 18, 142) to be three and a half to five miles an hour. Three witnesses (R. 49, 57, 61, 65, 154) testified there was no usual, customary or proper speed. This evidence was not sufficient to meet the requirements of a binding custom which will supersede the law; but proved no more than a loose, variable practice determined by the caprice of the individual switchman.

III.

Assuming, however, the sufficiency of the evidence to prove a custom, the undisputed evidence by both petitioner's and respondent's witnesses is that the so-called "usual" speed was fixed solely with relation to possible damage to cars, their contents and the tracks; and not

with relation to possible injuries to switchmen, who are expected to protect themselves (R. 26, 27, 143, 146, 154).

Inevitably, therefore, no duty was owed to respondent to limit the speed of shunted cars to the so-called usual or customary speed. Consequently, shunting cars at more than that speed could not have been a breach of any duty petitioner owed to respondent.

IV.

(a) Respondent's own evidence shows conclusively that the sole proximate cause of his injury was his own gross negligence in stepping on the track only ten or twelve feet away from the car (R. 99), at a time when by stepping a few feet towards the west he could have seen the shunted cars moving over the track. He made no effort so to do, but merely looked when and where, because his view was wholly blocked, looking was ineffectual (R. 99), and started across the track, confessedly without ascertaining whether or not cars were moving on that track (R. 99, 100).

(b) There is no evidence that respondent would not have been struck even though the cars had not moved at more than three and a half to five miles an hour.

Therefore, for two reasons respondent has failed to make a case: (1) no negligence of petitioner is shown, and (2) respondent's negligence was solely and proximately causal.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari shall be issued by this Court, addressed to the Circuit Court of Appeals, Eighth Circuit, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Terminal Railroad Association of

St. Louis, Appellant, v. A. T. Schorb, Appellee, that Court's number 13,081, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Circuit Court of Appeals, dated October 19, 1945 (petition for rehearing denied November 7, 1945), shall be reversed, and that petitioner shall have such relief as to this Court shall seem appropriate.

Respectfully submitted,

ARNOT L. SHEPPARD,
Attorney for Petitioner.